Supreme Court
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TROY L. GRAVES,
Petitioner

VS.

VESUVIUS USA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's summary judgment evidence was sufficient to raise fact issues precluding the entry of summary judgment in favor of Respondent on Petitioner's Title VII claim of race discrimination.

2. Questions that are essential to the determination of the ultimate legal issue cited above are:

   A. Whether Petitioner's summary judgment proof was sufficient to raise a fact issue as to a prima facie case of racial discrimination under McDonnell Douglas Corp. V. Green and/or Mayberry v. Vought; and

   B. Whether Petitioner's summary judgment proof, which included Petitioner's unrebutted testimony that he had been disciplined on three occasions prior to his discharge when a white person was at fault and was not similarly disciplined, and which included Petitioner's unrebutted testimony that he had been demoted from a position for which he was qualified and he was replaced by a white person, whom he had to train, and which included Petitioner's testimony contradicting the reason given by his employer for his discharge, were not factually sufficient to avoid summary judgment because Petitioner's testimony consisted of mere conclusions and opinions.

   C. If Petitioner's testimony, as described in B. above, was factual, was his testimony sufficient to raise a fact issue whether or not Respondent's proffered reason for Petitioner's discharge was false and pretextual.

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CITATIONS FOR REPORTS OF LOWER COURT DECISIONS IN THIS CASE

United States District Court, Western Division of Texas, Waco Division: not reported

United States Court of Appeals for the Fifth Circuit: not reported

STATEMENT OF JURISDICTION

Course of Proceedings

The United States Court of Appeals for the Fifth Circuit entered its judgment on the 5th of May, 1997. (A copy of the Fifth Circuit Judgment and Opinion is filed with this Petition in a separate volume designated as an "Appendix" to the Petition.)

Supreme Court Jurisdiction

Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C. § 1254(1), this being a petition for review of a judgment entered by the United States Court of Appeals for the Fifth Circuit on appeal from a summary judgment entered by the United States District Court for the Western District of Texas, Waco Division. (A copy of the District Court's Order is filed with this Petition in a separate volume designated as an "Appendix" to the Petition.)

This Petition is filed for two purposes: (1) to bring up a question of importance that significantly affected the outcome of this case and that s of grave public interest in the area of employment and civil rights, and (2) to secure uniformity of decisions between Circuit Courts of Appeals and between Circuit Courts of Appeals and this Supreme Court as follows.

Petitioner's summary judgment evidence in this case was entirely circumstantial.[1] The vast majority of Petitioner's circumstantial (or "indirect") proof of discrimination was not rebutted by the summary judgment evidence of Respondent, which included only two affidavits, (1) from Petitioner's immediate supervisor, Calvin Bell, and (2) from another employee whose testimony corroborated a small part of Mr. Bell's affidavit testimony. Both affidavits related solely to the facts and circumstances surrounding Graves' discharge. Also, both of Respondent's witnesses are black males, as is the Petitioner, and the district court[2] emphasized this fact in its opinion.[3]

Legal scholars, commentators, Congressmen and others have predicted that, following this Court's decision in St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993), a Plaintiff asserting a claim for individual disparate treatment will no longer be able to prove intentional racial discrimination if the claim relies solely on circumstantial or indirect proof. (See, e.g., *Rewarding employer's lies; Making intentional discrimination under Title VII harder to prove*, 44 DePaul Law Review 643 (1995), and references cited therein.) The future of claims, such as the claim asserted by the Petitioner in this case, is of great concern and interest to potential

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[1] A summary of Petitioner's summary judgment proof appears in the Statement of Material Facts, infra.

[2] The Court of Appeals merely adopted the district court opinion in this case.

[3] The district court seemed to consider the race of Petitioner's supervisor, and the race of the corroborating witness to be probative evidence against Petitioner's claim that Vesuvius intentionally discriminated against him (Court's Order, App. p.10-11) even though it has been well-established in the past that intraracial discrimination can and does occur. See Franceschi v. Hyatt Corp., 782 F.Supp. 712, 722 (D.Puerto Rico 1992) and cases cited therein.

litigants and professionals practicing in the area of employment law and civil rights.

The author of the DePaul Law Review note, cited supra, states that "while attempting to eliminate confusion regarding the allocation of proof in discrimination cases, the decision in St. Mary's creates confusion...." and "the question of what constitutes "sufficient" proof is presumably left open for the lower courts to resolve..." (at 711). However, summary judgments in individual disparate treatment cases based on circumstantial evidence substantially similar to the evidence presented in this case were denied and are still being denied in circuit courts other than the Fifth Circuit despite this Court's opinion in St. Mary's. See, e.g. Pollock v. A.T.&T Long Lines, 794 F.2d 860 (3rd Cir. 1986); Rodriquez v. General Motors Corp., 904 F.2d 531 (9th Cir. 1990); Cole v. Ruidoso Municipal Schools, 43 F.3d 1373, 1377-1381 (10th Cir. 1994).

The district court and the court of appeals assumed that this case had no legal significance and chose not to publish opinions. Obviously the Petitioner believes his case to have grave significance. If this Court compares this case with cases being decided in other circuits--even after St. Mary's--it should agree that there are grave disparities between circuits in the burden being placed on Plaintiff's asserting individual disparate treatment claims of discrimination. For these reasons, Petitioner urges this court to consider the summary judgment proof in this case as an opportunity to clarify the circumstances under which indirect or circumstantial evidence of discrimination will be sufficient to avoid summary judgment in the future.

STATEMENT OF MATERIAL FACTS

The record in this case established that Petitioner, "Graves", a black male, was employed by Respondent "Vesuvius" in 1988 (R. 11), and his employment was terminated on January 11, 1993 (Ex. 6, R. 324). His employment history, prior to

termination, included adverse employment actions as follows: (1) a written warning for "fighting" with a white employee, Meadors in 1990 (Ex. 8, R. 226), (2) a verbal warning for "carelessness" (Ex. 1, R. 217) in January of 1992, and (3) a verbal warning for "disobedience" in July of 1992 (Ex. 2, R. 218). The disciplinary action forms produced by "Vesuvius" confirmed that Graves disagreed with each disciplinary action at the time each occurred and Graves testified that each action was unjustified because he did not commit the acts that were alleged as the basis for the discipline imposed and that the white persons who were known by Vesuvius to be at fault in each instance were not similarly disciplined (R. 114-118 and R. 199-201; R. 118-128 and R. 195-196; R. 128-135). Vesuvius offered no summary judgment evidence disputing Plaintiff's testimony in this regard.

The record further established that shortly before Graves was discharged, a higher position, i.e. "lead man", was available temporarily, with the possibility that the assignment might become permanent. Graves had the highest seniority and was placed in the position, but Graves was removed from the position after one day and a white male, Danny Holt, who had less seniority than Graves, replaced him as lead man (R. 108-113; R. 180-182; R. 191-192). Mark Sullivan, a white male, made the decision to remove Graves from the position but he did not give any reason for his decision (R. 180, l. 9-15; R. 191-192). Graves actually had to train Holt for the lead man position (R. 191, l. 9-17). Danny Holt also took Graves' place after Graves was discharged and Holt ultimately was promoted to the position of lead man, even though there were three black males in the department who had seniority (R. 154).

The record further established that Graves' employment with Vesuvius was terminated on January 11, 1993. The personnel action form cited "disobeing orders" and "falsification of information" as reasons for Graves' discharge (Ex. 6, R. 324). Graves testified that he did not commit either of the acts that

were cited as the basis of his discharge (R. 166-178 and R. 201-204 and R. 209-212).[4]

As noted supra, Graves' supervisor, Bell[5], was also a black male. Vesuvius' summary judgment proof did not dispute Graves' testimony that Mark Sullivan, a white male, actually controlled the disciplinary actions and that Bell repeatedly told Graves that he (i.e. Bell) was instructed by his white supervisor to impose discipline on Graves (R. 199-200; R. 118, l. 20-23; R. 131, l. 19-24; R. 134, l. 15; R. 135, l. 7).[6]

Graves contended that his discharge was part of a pattern and practice of discrimination against him on the basis of his race and was also part of a plan by Vesuvius to open up positions for white employees, like Danny Holt, who had been laid off when Vesuvius shut down one of its two divisions, i.e. its "Viso" division (R. 159-164).

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[4] A complete analysis of the summary judgment evidence relating to the facts and circumstances surrounding Graves' discharge are discussed in detail in Petitioner's argument, in a section entitled "legitimate non-discriminatory reason". The evidence consisted of excerpts from Graves' deposition (testimony and exhibits) and two affidavits submitted by Vesuvius.

[5] After Graves' discharge, Bell was demoted from his supervisory position to a lead man position and was replaced by a white male (R. 161-162, 189).

[6] Graves also testified, without contradiction by Vesuvius, that after Graves was discharged, Bell told him that he was just following Sullivan's instructions when he terminated Graves and that either he (Bell) or Graves was going to get fired (R. 187).

ARGUMENT

Standard of Review

A court's grant of a summary judgment is to be reviewed de novo. "Summary judgment is proper when no issue of material fact exists and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was proper, all fact questions are viewed in the light most favorable to the non-movant." Moore v. Eli Lilly Co., 990 F.2d 812, 815 (5th Cir. 1992), cert. denied, 114 S.Ct. 467, 126 L.Ed.2d 419 (1993). The party seeking summary judgment is supposed to bear an "exacting burden of demonstrating that there is no actual dispute as to any material fact in the case. Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026,1031 (5th Cir. 1982). In determining whether the movant has met its burden, the Court must view the evidence presented and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment. Id., at 1031.

1. Summary Judgment Evidence. In the instant case, the District Court, and the Fifth Circuit, by adopting the District Court's findings and conclusions, implied that Graves' Response to Vesuvius' Motion for Summary Judgment was insufficient because it failed to "designate" specific facts as required by law, citing Nissho-Iwai American Corp. v. Kline, 845 S.W.2d 1300 (5th Cir. 1988); Savers Federal Sav. & Loan Ass'n v. Reetz, 888 F.2d 1497 (5th Cir. 1989); Franz Chemical Corp. v. Philadelphia Quartz, 594 F.2d 146 (5th Cir. 1979); and De Bardeleben v. Cummings, 453 F.2d 320 (5th Cir. 1972). (Court's Order, R. 321-322) All of the cases cited by the court are clearly distinguishable from the case at bar and the record in this case will show very clearly that Graves' summary judgment proof was specifically referenced for the Court.

Vesuvius submitted two affidavits in support of its Motion for Summary Judgment, both of which had assertions of fact relating solely to Vesuvius' alleged reason for termination of

Graves' employment and to the facts and circumstances Vesuvius alleged to have occurred in connection with Graves' discharge (R. 60-63). In support of Graves' Response to Vesuvius' Motion, Graves submitted deposition excerpts (R. 099-229)[7] that contained:

1. A detailed statement of the events that occurred in connection with Graves' discharge, which contradicted and refuted the events described in Vesuvius' affidavits; and

2. A detailed statement of facts sufficient to establish a prima facie case of discrimination on the basis of race under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)[8] and under the Texas

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[7] In the district court's Order (R.322), the Court reiterated its implication that Plaintiff failed to meet his burden to "designate" facts responsive to a summary judgment motion, citing Topalian v. Ehrman, 954 F.2d 1125 (5th Cir. 1991), which is also clearly distinguishable from the case at bar. In Topalian, the appellant, in response to motions for summary judgment, relied on its unsworn Pre-Trial Order and its Complaint (FN 14 at 1132; Text at 1133; FN 19 at 1133; Text at 1136; FN 31 at 1137; Text at 1137-1138) and a one page deposition excerpt and an unsigned letter (Text at 1138). In the instant case, Plaintiff relied on selected deposition excerpts from his own sworn deposition which is competent summary judgment proof clearly distinguishable from the unsworn pleadings and Pre-Trial Order offered in Topalian. The deposition excerpts include factual detail and not merely conclusions or opinions of Plaintiff.

[8] Vesuvius never contested the fact that Graves' position was filled by Danny Holt, a white male, who had previously been laid off when the VISO division was shut down. See Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1246 (6th Cir. 1995), wherein the Court held that the Plaintiff employee was not required to establish that he was similarly situated to the white employees who were rehired after layoff in

Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) and under Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995); and

3. A detailed statement of the events that occurred in connection with prior disciplinary action by Vesuvius and in connection with his removal as "lead man" when he was first replaced by Danny Holt; and Graves' statement of facts was sufficient to show that Vesuvius had engaged in a past pattern and practice of disparate treatment of Graves with respect to the terms and conditions of Graves' employment, particularly the terms and conditions relating to past disciplinary action imposed on Graves and not imposed on his similarly situated non-minority counterparts.

The district court's Order in this case (Order, R. 322) stated that a non-movant cannot rely on "conclusory" affidavits, citing Hansen v. United States, 7 F.3d 137 (9th Cir. 1993), implying that Graves' deposition excerpts are conclusory only.[9] Again, to the contrary, the record will show that Graves' testimony is replete with statements of fact as required by law; the specific statements of fact (as opposed to conclusions) were presented to the district court and the court of appeals and are presented in arguments below.

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order to satisfy the fourth prong of the McDonnell Douglas test where the Plaintiff presented evidence that his previous position was filled by a white person.

[9] Again, the case cited by the District Court, to-wit Hansen v. United States, is distinguishable from the case at bar.

All summary judgment proof referenced above is incorporated by reference herein for all purposes.[10]

2. Prima facie case. The district court initially acknowledged that Graves could prove a prima facie case by producing evidence that: (1) he is a member of a protected class; (2) he was qualified for the job from which he was discharged; (3) he was discharged; and (4) he was replaced by or the position was given to a non-minority (Order, R. 324). McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Alternatively , the court stated that Graves could establish a prima facie case by showing that he did not violate the work rule or by showing that white employees who engaged in similar acts were not punished similarly (Order, R. 325). Mayberry v. Vought Aircraft Co., 55 F.3d 1086 (5th Cir. 1995). Despite the fact that Graves established a prima facie case of discrimination pursuant to McDonnell Douglas and Burdine, the district court erroneously assumed that Mayberry was the only paradigm applicable in this case and further erroneously determined that Vesuvius was entitled to summary judgment because Graves could not establish a prima facie case pursuant to Mayberry (Order, R. 332). Assuming arguendo that Mayberry is the *only* paradigm for a establishing prima facie case in this case, the summary judgment evidence, as a whole, including Graves' deposition testimony and statements, omissions and contradictions in Vesuvius' affidavits, nonetheless is sufficient to raise a fact issue with respect to whether or not Graves violated a work rule, and therefore is

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[10] Graves' argument and authorities in his Response to Vesuvius' Motion for Summary Judgment is also incorporated by reference and reasserted herein.

sufficient to withstand summary judgment in this case according to Mayberry (at 1090).[11]

3. Legitimate, non-discriminatory reason. Vesuvius claimed in court that Graves was terminated for violating two rules: (1) refusal to follow a supervisor's directive and (2) falsification of information on his time card. However, the affidavits submitted by Vesuvius did not support the district court's conclusion that Vesuvius cited both of these reasons at the time he was terminated.[12] Graves' deposition was clear and unambiguous that

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[11] The district court made at least three significant factual determinations that were simply not supported by the summary judgment evidence in this case. These factual errors, more likely than not, contributed to the court's erroneous conclusion that summary judgment should be granted in this case. Exhibit "A", attached hereto identifies the three major factual errors. The first error is most relevant to the issue of whether or not Graves' raised a fact issue with respect to a prima facie case of discrimination. The first error identified in Exhibit "A" is also extremely important to Graves' position that the justification stated by Vesuvius (via Bell's affidavit) for Graves' termination was actually fabricated after Graves was terminated.

[12] Bell's Affidavit referenced only one reason for Graves' discharge as of January 11, 1993, as follows:

> "On Monday, January 11, 1993, James Johnson, Mark Sullivan, and I met about Troy Graves, and we collectively decided that Troy Graves had to be terminated for violating a work rule which required him to follow a supervisor's directive. We then met with Troy Graves to discuss his refusal to return to work the previous Friday and the fact that he was being terminated for his refusal to follow a supervisor's directive..."(R.061)

Bell's affidavit did not state that Graves was told on January 11th that he was being discharged for "falsification of information."

on January 11, 1993, the day he was terminated, he was only told that he was being terminated for not putting in his "whole eight hours", and that he told his supervisors that he did put in his whole eight hours and they could verify that fact by looking at his time card. (See testimony in Exhibit "A", Error 1.) Vesuvius also submitted a termination form in support of its justification for Graves termination, but the form was not submitted to Graves for his signature on the day he was terminated and the Exhibit (No. 6, referenced in Exhibit "A", Error 1) showed on its face that it was amended on January 12, 1993, to add a charge of "falsification of information". Ex. No. 6 was also suspect because two distinctly different handwriting styles appeared in the "Comments" section of the form.

Bell's affidavit does allege that Graves told him (Bell), on January 8, 1993, at 1:40 p.m. that he (Graves) already clocked out. Bell's affidavit does not state, that he, Sullivan, and Johnson discovered, on January 8, 1993, that Graves had not punched out at 1:40 p.m. but had instead punched out at 2:04 p.m. Specifically, Bell's affidavit stated that:

> "After Graves left[13], I explained the incident to my supervisor, Mark Sullivan. He and I then informed James Johnson, Manufacturing Manager, and they reviewed the situation. *After reviewing what had happened and looking at Graves' time card, it was learned that Graves had not punched out when I first ordered him back to work at 1:40 p.m., but that he actually punched out at 2:04 p.m....* (R. 061, emphasis added).
>
> "At no time did Graves ask me for permission to leave work nor did I ever give him permission to leave. Graves did not tell me that he was going to clock out, but

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[13] Implicitly referring to Graves' departure on Friday, January 8, 1993, afternoon.

did tell me at 1:40 p.m. that he had already clocked out." (R. 061)

These paragraphs *precede* the paragraph in Bell's affidavit that described the meeting between Graves, Johnson, Sullivan, and Bell on January 11th, when Graves was discharged. The sequencing of the paragraphs in Bell's affidavit implies (but does not state) that Bell discovered that Graves actually clocked out at 2:04 p.m. before, rather than after the meeting on January 11th. The district court erroneously interpreted Bell's affidavit to mean that Bell, Sullivan, and Johnson had learned on January 8th that "Graves had not clocked out when Bell first ordered him back to work at 1:40 p.m. but had instead waited until 2:04 p.m. after Bell had ordered him back to work several times" (Order, R. 331) and that they had told Graves on January 11th, that he had been charged with "falsification of information" (Order, R. 331), i.e lying about clocking out at 1:40 p.m..

Graves' deposition testimony relating to the January 11th meeting is fully set forth in Exhibit "A" attached and clearly contradicts any implications that might have formed the basis of the district court's decision in this case.

In summary, based on the summary judgment evidence presented by Vesuvius (particularly Exhibit No. 6), a finder of fact could and probably would easily conclude that the *only* charge appearing on the Vesuvius Termination Form on January 11, 1993 was a charge of "disobeing [sic] an order." Such a charge might be consistent with Graves' testimony that he was accused of only one thing on January 11, 1993, i.e. "not working a full eight hours" or punching out early (ostensibly in violation of an order to return to work or without permission). It is much more likely that Bell, Sullivan, and Johnson did not learn that Graves had clocked out at 2:04 p.m. until after the meeting. When they discovered that Graves had not clocked out at 1:40 p.m. as Bell had probably told them, they had to deal with the time card that showed that he had clearly completed his eight-hour shift, so they added the charge of

"Falsification of Information" based on Bell's prior statement that Graves had told him that he clocked out at 1:40 p.m. Also, Bell's affidavit confirmed that the "falsification of information" charge was based on Graves' alleged statement to him that he (Graves) had "already punched out" at 1:40 p.m.

Graves testified that he did talk to Bell about 1:30 p.m., that he knew that he had to stay at his station until he was relieved by the next shift, that he did so, that he helped clean up in his area and the casting area and then left the plant (R. 201, l.22 - R. 205, l.10).

Bell's affidavit omitted significant relevant facts. Bell's affidavit does not account for the twenty-minute period between 1:40 p.m. (i.e., the time that Bell allegedly issued his original order to Graves to return to work and help clean up the floor) and 2:04 p.m. (i.e., the time that Graves clocked out and left the building). In other words, Bell does not state what he was doing or what Graves was doing during that time. Therefore, the twenty-minute gap, unaccounted for by Bell, also would have provided fodder for cross-examination questions such as "Why did Troy Graves hang around work from 1:40 p.m. until 2:04 p.m. if he was disobeying an order to return to work at 1:40 p.m.?"

Bell's affidavit expressly referenced only two instances when he allegedly ordered Graves to return to work, one at approximately 1:40 p.m. and one that was apparently after Graves clocked out at 2:04 p.m., i.e. after Graves had completed more than a full eight-hour day (R. 060). Bell claimed that he followed Graves out of the plant and ordered him to return to work. Bell's affidavit did <u>not</u> state that Graves had <u>not</u> completed the work he was told to do at 1:40 p.m. (R. 060) and did <u>not</u> state that there was still work to be done after Graves actually clocked out at or about 2:04 p.m. Bell's affidavit also did <u>not</u> state that other employees, whose shifts ended at 1:30 or 2:00 p.m., had not yet left the plant and/or were still working and/or cleaning their work areas. In other words, Bell's affidavit does <u>not</u> justify that his

alleged post-2:04 p.m. order was a "reasonable one", as required by the Employee Handbook introduced as summary judgment proof by Vesuvius, which states the misconduct that may lead to immediate termination includes: ..."6. Failing to carry out *any reasonable order* by a management representative, including ..." (R. 076, emphasis added) On the other hand, the undisputed summary judgment evidence, offered by Graves, was that he cleaned up his station, helped clean up two piles of debris that remained on the casting floor, left the "hopper" at the end of the aisle on the casting floor, and that other employees had already clocked out before he left and that the remainder clocked out shortly thereafter (R. 204).

Surely, under the state of the record in this case there was a fact issue as to whether or not the reason given by Vesuvius' for discharging Graves was true. If a Plaintiff educes evidence that the reason proffered by the employer is false or "incredible", and the jury disbelieves the employer, the Plaintiff's evidence that the employer's reason was false may in and of itself be sufficient to support a jury's finding of discrimination. Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996). In the instant case, Graves' evidence contradicting the credibility of Vesuvius' charges is buttressed with evidence that he repeatedly been disciplined in the past for acts which he did not commit, and the overall pattern of false accusations should clearly be sufficient to defeat Vesuvius' Motion for Summary Judgment.

4. Pretext. The district court unduly emphasized the fact that the two primary witnesses for Vesuvius in the summary judgment proceedings, i.e. Bell and Middleton, were themselves African-Americans (Order, R. 333). In so doing, the court disregarded Graves' undisputed summary judgment proof that Bell told Graves that he was just following Mark Sullivan's instruction when he recommended discharging Graves and that either he (i.e. Bell) or Graves was going to get fired (R. 187). Also, the summary judgment evidence is undisputed that Bell was subsequently demoted from his supervisory position to a lead man position after

Graves' discharge and was replaced by a white male (R. 161-162, R. 189). In this case, Bell's credibility and/or state of mind (e.g. the threats of termination by his white male supervisor, Mark Sullivan) are clearly at issue. As noted in Graves' Response to Vesuvius' Motion for Summary Judgment, prior to this Court's decision in St. Mary's, the Fifth Circuit had admonished that summary judgment may be inappropriate and should be utilized with extreme caution when either credibility or state of mind are at issue. See, e.g. Richardson v. Oldham, 12 F.3d 1373, 1379 (5th Cir. 1994)("Credibility determinations have no place in summary judgment proceedings."); International Shortstop, Inc. v. Rally's Inc., 939 F.2d 1257, 1265 (5th Cir. 1991)("When state of mind is an essential element of the non-moving party's claim, it is less fashionable to grant summary judgment because a party's state of mind is inherently a question of fact which turns on credibility."). Credibility is an issue which can be resolved only through trial and the tool of cross-examination. International Shortstop, 939 F.2d at 1265-66. Determinations of intent are ill-suited to summary judgment for two reasons. First, "it is particularly difficult for the moving party to challenge the 'self-serving testimony' of the moving party without the benefit of trial accessories, namely cross-examination." International Shortstop, 939 F.2d at 1265. Second, "evidence probative of the moving party's state of mind may be more difficult to procure because it typically is held in the exclusive possession of the moving party". Id. at 1266. These axioms are particularly applicable in employment discrimination cases, warranting the sparing use of summary judgment for disposition. The employee bears a difficult burden in proving discriminatory intent.

> Intent can usually only be inferred from circumstantial evidence. Today, employers, and their supervisors, who might choose to discriminate on the basis of race have become, as a result of twenty years of Title VII litigation, too sophisticated to use racial epithets or to leave glaring tracks if an employee is being discharged for race-related reasons. Instead, the motive is veiled behind

> apparently neutral remarks about business necessity, an employee's inadequate performance and the like.
>
> . . .
>
> Thus, a court faced with a disparate treatment Title VII case such as this one must often look behind and beyond an employer's words and ask probing questions about the practices of the workplace, seeking out and attempting to resolve any inconsistencies in the manner of dealing with the employee in question. We should not be satisfied with anything less than a probing analysis of the facts if two people of different [protected classes], similarly situated, receive different treatment from their employer.

Barnes v. Yellow Freight Systems, Inc., 778 F.2d 1096, 1101 (5th Cir. 1985). See also Thornbrough v. Columbus and Greenville R. Co., 760 F.2d 633, 640-41 (5th Cir. 1985)("Often, motivation and intent can only be proved through circumstantial evidence; determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder."). Do these rules still apply after St. Mary's?

Contrary to decisions rendered by other Circuits courts, both before and after St. Mary's, in cases substantially similar to this case, the district court, and subsequently the Fifth Circuit erroneously held that Graves did not present any evidence of pretext, finding that Graves' examples of prior disparate treatment, such as his removal as lead man and replacement by Danny Holt, a white man, and past disciplinary actions that were unjustified by facts, were merely "extraneous examples" of "perceived" past discrimination and not probative evidence of pretext (Order, R. 333).

Prior to St. Mary's,[14] the Fifth Circuit had recognized that past acts evidencing disparate treatment of employees on the basis of race, sex, age, etc. are legitimate evidence of pretext and are sufficient to raise a fact issue that will defeat summary judgment. See, e.g. Johnson v. Chapel Hill Independent School District, 853 F.2d 375 (5th Cir. 1988), wherein hearsay testimony of disparate treatment of another employee, admitted without objection, and a Plaintiff's testimony that her white replacement was less qualified than she, was cited as sufficient evidence to support a trial court's finding that the Plaintiff had been discriminated against on the basis of her race (at p. 381). See also the Eighth Circuit cases that have held that an employer's past discriminatory policy and practice "should normally be freely admitted at trial" because it may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination", which cases are cited as authority by the Fifth Circuit in Kelly v. Boeing, cited supra, at p. 358-359.

In the instant case, Graves presented summary judgment evidence that he had been the victim of disparate treatment on prior occasions. One such example of disparate treatment arose within the two months preceding Graves' termination, when Graves was "in line" to serve as lead man in the absence of his regular lead man, Mike Garcia. Graves did serve in that position for one day, but was subsequently removed and replaced by a white man, Danny Holt, who had less seniority than Graves. In evaluating the probative value of Graves' evidence relating to this particular incident, the district court erroneously stated the summary judgment facts presented by Graves, and erroneously

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And in one case decided after St. Mary's, to-wit: Kelly v. Boeing Petroleum Services, Inc., 61 F.3rd 350 (5th Cir. 1995), wherein the Court stated "In discrimination cases...such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive" (at p. 360).

concluded that Graves' evidence was insufficient to raise an issue of discrimination because Graves relied "solely on seniority to support his position that he was qualified for the position of lead man." In addition to the evidence relating to Graves' greater seniority, Graves' undisputed summary judgment evidence was (1) that he had actually served as lead man for one day and (2) that, when he was removed, by directive of Mark Sullivan, a white man, Graves was assigned to *train* his white replacement to perform the job of lead man. (See Factual Misstatement Example No. 2 in Exhibit "A", attached, for complete details of Graves' deposition.) If one analyzes Graves' evidence relating to this "lead man" incident, the evidence clearly meets the McDonnell Douglas and Burdine requirements for proving a prima facie case of discrimination against Graves in the past. Graves' testimony established that he was a member of a protected class, that he was qualified for the position (by actual service as lead man and by the fact that he had to train his replacement), that he was removed from the position, and that he was replaced by a white man. Vesuvius did not present any summary judgment evidence rebutting Graves' testimony. Absent some statement of a legitimate non-discriminatory reason by a Defendant, the presumption of discrimination, created by a Plaintiff's prima facie case, is clearly sufficient to raise a fact issue as to whether or not disparate treatment occurred.

Other examples cited by Graves as evidence of past discrimination against him also met the legal requirements of proving a prima facie case of discrimination. For example, in July of 1992, six months prior to Graves' termination, Graves was cited for alleged "disobedience" for not showing up for work on a Saturday. Graves testified that he was not scheduled to work on the Saturday in question, that Kent Leech, a white employee, was scheduled to work, and that Kent Leech did not show up for work and was not cited for failing to appear; Vesuvius did not offer any rebuttal to Graves' testimony. Under Mayberry, cited supra, Graves' evidence is sufficient to establish a prima facie case of discrimination in this incident because the evidence establishes

without dispute that Graves did not commit the work rule violation as charged; and therefore Graves' testimony is sufficient to establish a presumption of racial discrimination in the case of the July, 1992, disciplinary action. (R. 128-135) By way of further example, in January of 1992, twelve months prior to Graves' termination, Graves was disciplined for "carelessness" for allegedly pouring molds improperly. Graves testified that he did not pour the molds and played no role in the production of the defective items except to deliver the funnels to the white employees that poured the molds. Again, Vesuvius did not offer any evidence disputing Graves' testimony. Again, under Mayberry, cited supra, Graves' evidence would be sufficient to establish a prima facie case of discrimination in this incident (involving an allegation of a work rule violation) because the evidence establishes without dispute that Graves did not commit the work rule violation as charged and therefore Graves' testimony is sufficient to establish a presumption of racial discrimination in connection with the January, 1992, disciplinary action. (R. 118-128; 195-196) By way of further example, Graves was disciplined for "fighting" in 1990. Graves testified that he did not fight, that he did not start the fight, that he did nothing to incite a white co-worker to kick him (i.e. Graves) and that the co-worker admitted to Mr. Sullivan that it was his fault and that Graves had not done anything wrong, but that Sullivan, a white male, would not believe that Graves didn't precipitate the kick. Again, Vesuvius did not offer any evidence disputing Graves' summary judgment evidence. Under Mayberry, cited supra, Graves' evidence again is sufficient to establish a prima facie case of discrimination in this incident (involving an allegation of a work rule violation) because the evidence establishes without dispute that Graves did not commit the violation. Therefore, Graves' testimony is sufficient to establish a presumption of racial discrimination in connection with the 1990 disciplinary action. (R. 114-118; 199-201)

Graves also presented evidence that he was denied benefits that were freely granted to white employees. Graves testified that the week prior to his termination on January 11, 1993, another

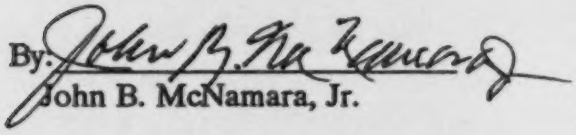
employee, Ben White (who was white) was allowed to leave work early because his wife was sick. Graves, who also requested to leave because his wife was sick during the same week was not allowed to leave early. The district court incorrectly stated the facts relating to Graves' request to leave early during the week preceding his termination, concluding that Graves' *only* request to leave early was the request precipitated by the need to "fix a flat". (See Court's Order, R. 334 and Factual Misstatement No. 3 in Exhibit "A" attached for complete detail.) In fact, the early leave requests by White and Graves were exactly the same; however, the white employee's request was granted and Graves' request was denied. This testimony by Graves is also probative evidence of disparate treatment, raising a prima facie presumption of discrimination on the basis of race. Again, Graves' testimony was not rebutted by Vesuvius' summary judgment evidence.

The accumulation of these examples of previous disparate treatment in the terms and conditions of Graves' employment clearly is sufficient to raise a fact issue as to whether race discrimination was a "motivating factor" in the final decision to terminate Graves' employment.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court grant Petitioner's Petition for Writ of Certiorari, review the decision of the Fifth Circuit Court of Appeals, rendered on May 5, 1996, reverse the Judgment of the Fifth Circuit Court of Appeals, and remand this case to District Court for trial on the merits.

Respectfully submitted,

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By: 
John B. McNamara, Jr.

Attorney for Petitioner

EXHIBIT "A"

"INCORRECT FACTUAL STATEMENTS IN COURT'S OPINION"

1. **COURT'S OPINION:**

"On January 11, 1993, Bell, Johnson and Sullivan met with Graves and informed him that he was being terminated for violating a work rule which required him to follow a supervisor's directive *and for falsification of information on his time card.*" (Opinion, p. 13, emphasis added)

Actual Evidence:

(a) Bell Affidavit:

"We then met with Troy Graves to discuss his refusal to return to work the previous Friday and the fact that *he was being terminated for his refusal to follow a supervisor's directive.*" (emphasis added)

(b) Graves Deposition: p. 101-103

"Q. ...what time did you go in on January 11, 1993?
A. About 5:00.
Q. And what happened after you went to work?
A. I was working on the casting floor and they told me they -- Calvin came to me and said they're -- having a meeting, they need you in a meeting.
Q. About how long was that after you came to work at 5:00 a.m.?
A. Maybe about an hour, maybe about an hour.
Q. Okay. And who was in that meeting that you went to?
A. It was Calvin Bell, Mark Sullivan and Jim Johnson.
Q. What were you told during that meeting?

A. *That I was being terminated for not putting in my whole eight hours.* (emphasis added)

Q. On what day were they saying you had to put in the whole eight hours?

A. That Friday, or let's say January the 8th, if it was that Friday.

Q. Okay. Tell me what you recall Mr. Bell saying during that meeting.

A. During the meeting, Mr. -- Calvin didn't say anything, he just told me it was a meeting.

Q. And he --

A. Mark Sullivan and Jim Johnson was doing the meeting.

Q. So Calvin went to the meeting but he didn't say anything. Is that right?

A. Right.

Q. And what did Mark Sullivan say during the meeting?

A. He said that he had my files right here. He had like a folder and he didn't show me no documents or anything and he said that -- that I had clocked out early and that was my intention, and *he said that I clocked out early and they was going to fire me -- determinate me or fire me for clocking out early, that I didn't put in my eight hours.* (emphasis added)

Q. Do you recall Mr. Sullivan saying anything else during the meeting?

A. And he said that, you know, he had, you know, supposed to have been, I guess -- you know, a witness at that time, you know.

Q. Do you recall Mr. Sullivan saying anything else during that meeting?

A. That was it.

Q. What --

A. He told me to leave at that time and I got up and left.

Q. And departed the plant?
A. He told me to leave at this time, yes.
Q. What did Mr. Johnson say during the meeting on the morning of January 11, 1993?
A. *They both agreed that was the reason that they was determinated me, were firing me for, for leaving work early, didn't put in my full eight hours.* (emphasis added)
Q. On the previous Friday?
A. On that Friday.
Q. Do you recall anything else that Mr. Johnson said during that meeting?
A. Not at this time, no.
Q. What did you say during the meeting?
A. *I told them to check the time card, they'll see what time that I clocked out.* (emphasis added)
Q. Do you recall saying anything else?
A. That's it."

(c) Graves' Deposition: p. 182 - Re: Exhibit 6 (termination report)

"Q ... I want to show you what's been marked as Graves Exhibit 6. Now, this document right here, did you ever see that during that discussion that you had with Mr. Sullivan and Mr. Bell and Mr. Johnson?

A. No.
Q. You never signed it?
A. No.
Q. And did they ever prepare a form or do anything or have you sign anything that was like in Exhibit 1 here?

A. No. I didn't sign anything in that -- on that morning.

(d) Note Re: Exhibit 6

Exhibit 6 shows on its face that it was amended on January 12, 1993 (the day after meeting with Graves) to include a charge of "Falsification of Information". Also the statement "He also lied about having punched out his time card" appears to have been added to the form (under "Additional Comments") since the handwriting is clearly different from the handwriting of other statements included in the "Additional Comments" section of the form.

2. COURT'S OPINION:

"Plaintiff also complains that the decision to not appoint him to a lead man position was discriminatory; however, *he fails to provide the Court with any summary judgment proof of discrimination other than the fact that he claims the position was given to a white man with less seniority.*" (Opinion, p. 16, emphasis added)

Actual Evidence:

(a) Graves Deposition: Beginning on p. 136, line 1

"Q. ... I was denied this because they stated that they didn't want me to be the lead man over this crew." That's an accurate statement of your position?
A. I know they didn't let me be the lead man over the crew --
Q. Yeah.
A. -- that would be almost accurate, yes.
Q. Who told you they didn't want you to be the lead man over this crew?
A. Well, the job was took from me when Mark Sullivan didn't let me be the lead man.
Q. When did that occur?

A. Back in the fall of '92. Remember when I --

Q. That's when they put Danny Holt there?

A. Yes.

Q. Okay. What I'm trying to find out is did anyone specifically say to you, "We don't want you to be the lead man," or words to that effect?

A. Well, when they gave it -- no, they didn't say those exact words, but they didn't let me be the lead man, period.

• • •

(Resuming on page 176, line 3)

Q. Did you ever talk to Mr. Sullivan about -- Well, let me ask you this: did you ever serve as the lead man when Mike Garcia was either on vacation or on decision-making leave or whatever he was doing, did you ever serve as the lead man?

A. Yes, for one day.

Q. And who -- who told you the next day or how were you told -- When you came in the next day, did you expect to be the lead man again?

A. Yes. But they had a meeting -- *Mark Sullivan held a meeting that morning and told me that I had to train Danny Holt for that position and Danny was going to be the lead men -- lead man.*
And I trained him and I taught him, I trained him.
(emphasis added)

Q. Did you express your -- any dissatisfaction with that decision to Mr. Sullivan?

A. Yes, at the time, I told him that wasn't right, I had more seniority than he did and that they told me that whenever Mike Garcia was absent or Calvin be absent, that Mike Garcia would go to Calvin's position and I would be the lead man. And it was taken away from me, they didn't let me be the lead man.

Q. And how long did that occur, how long was it before you were terminated that that occurred, if you recall?

A. It wasn't months, wasn't' even two months. Two -- a couple of months, put it like that.

3. COURT'S OPINION:

"Plaintiff claims that Brian West, another Vesuvius employee, left work early, but Plaintiff was not allowed to do so in this case. Bell Depo. (sic) at p. 74. The situations, however were clearly not substantially similar; *West was allegedly allowed to leave early because his wife was sick and Plaintiff requested to leave early because he wanted to fix a flat.*" (Opinion, p. 15-16, emphasis added)

Actual Evidence:

(a) Graves Deposition: Beginning on p. 74, line 4

"Q. ... Okay, before we took the break you were telling me about an incident involving Ben West. Would you go ahead and tell me what involving Ben West you think amounted to racial discrimination?

A. Yes. On Ben West, he was getting off at 3:30, he was going -- leaving work early, where we had to work -- where I had to work, you know, longer terms, work back on the casting floor, and we were supposed to go back to the casting floor and maybe help out on the casting floor to get them out earlier for due to the production.

Q. And Mr. West was white?

A. Yes.

Q. And you believe he got to leave early because he was white and you had to stay later because you were black?

A. Yes.

Q. Did that instance of Mr. White -- Mr. West getting to leave early happen on more than one occasion?
A. Yes.
Q. On about how many occasions?
A. During that week, he was leaving all during -- all during that week early. So it's been more than over four times.
Q. Did it happen just during one week?
A. It was -- happened before, you know. You know, sometimes in that week or before that week, sometimes he would leave early, wasn't working the -- the overtime.
Q. Do you have any idea why he was leaving early?
A. He had stated that his wife was sick. Due to that, that's the only reason I know, other than that.
Q. Do you have any reason to believe he was not telling the truth?

. . .

(Resuming on p. 76, line 19)

Q. *Was there ever an instance when your wife was sick and you asked to leave early and they told you you couldn't leave*?

(Brief pause.)

A. *Can I say this? Yes, I -- I asked to leave early before I was determinated that week or my wife also sick that same -- during that week when I got determinated.* (emphasis added)

(Resuming on p. 77, line 6)

Q. Who told you you couldn't leave?
A. Calvin Bell.
Q. Did you go ahead and leave anyway?
A. No.

(2)

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NO. _____

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TROY L. GRAVES,
Petitioner

VS.

VESUVIUS USA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

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ATTORNEYS FOR PETITIONER

21 pp

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

TROY L. GRAVES	§	
Plaintiff,	§	
	§	
v.	§	**Civil No. 96-50621**
	§	
VESUVIUS USA,	§	
Defendant.	§	

ORDER

Came on to be considered the of Defendant's motion for summary judgment and Plaintiff's response thereto. After careful consideration, the Court determines that the Defendant's motion is meritorious and is therefore granted.

I. Background

Plaintiff Troy L. Graves ("Graves") is a former employee of Defendant Vesuvius USA ("Vesuvius"). The Defendant contends that on January 8, 1993, Graves disobeyed a direct order from his supervisor Calvin Bell ("Bell") to return to work and instead left the premises. When he returned to work on January 11, 1993, Plaintiff's employment at Vesuvius was terminated for allegedly failing to follow his supervisor's order.

Graves, however, contends that his termination "was part of a pattern of Vesuvius to open up positions for white employees who had been laid off when Vesuvius shut-down one of its divisions, i.e. 'Viso' division." Plaintiff Graves' Response to Defendant Vesuvius USA's Motion for Summary Judgment at p. 3. Plaintiff, therefore, filed this lawsuit on

August 22, 1995, pursuant to Title VII and Title 28, United States Code, Section 1981, seeking $250,00000 in compensatory and punitive damages and reinstatement to his former position.

II. Discussion

A. Summary Judgment

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED.R.Civ.P. 56(c). The party seeking summary judgment bears an "exacting burden of demonstrating that there is no actual dispute as to any material fact in the case." Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1031 (5th Cir. 1982).

In determining whether the movant has met its burden, the Court must view the evidence presented and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment. See id. at 1031. All reasonable doubts as to the existence of a genuine issue of material fact must be resolved against the movant. See id. at 1031; Jones v. Western Geophysical Co., 669 F.2d 280, 283 (5th Cir. 1982). When determining whether to grant summary judgment, the Court is merely determining whether a factual dispute exists and is not required to resolve those disputes. See Jones, 669 F.2d at 283. The fact that it appears to the Court that the non-moving party is unlikely to prevail at trial or that the movant's statement of facts appears more plausible is not a reason to grant summary judgment. See id. at 283.

However, if the movant satisfies his initial responsibility, based on "the pleadings, depositions, answers to

interrogatories and admissions on file, together with affidavits, if any," of an absence of a genuine issue of material fact, and they are entitled to judgment as matter of law, the non-movant must present sufficient summary judgment proof indicating that a material fact is in dispute or that the movant is not entitled to judgment as matter of law. Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552 (1986). By imposing this requirement on the non-movant, Rule 56 isolates and disposes of factually unsupported claims and defenses. Id. at 2553. It is not a disfavored procedural shortcut, but rather "an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Celotex, 106 S.Ct. at 2555; FED.R.CIV.P. 1. Thus, summary judgment should be granted when "critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the non-movant, or where it is so overwhelming that it mandates judgment in favor of the movant." Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir. 1993).

In order to successfully oppose a motion for summary judgment, the non-movant must "designate specific facts showing that there is a genuine issue for trial." Nissho-Iwai American Corp. v. Kline, 845 F.2d 1300, 1307 (5th Cir. 1988); See also, Savers Federal Sav. & Loan Ass'n v. Reetz, 888 F.2d 1497, 1501 (5th Cir. 1989); Franz Chemical Corp. v. Philadelphia Quartz, 594 F.2d 146, 150 (5th Cir. 1979); De Bardeleben v. Cummings, 453 F.2d 320, 324 (5th Cir. 1972). A non-movant does not meet his burden by merely referring to his attached deposition. Id. at 1307. The Court is under no obligation or duty to search the entire record to determine whether a genuine issue of material fact exists. Id. Additionally, when the non-movant relies on affidavits, "it cannot rely on conclusory allegations unsupported by factual detail to create an issue of material fact." Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993). Thus, as the Fifth

Circuit emphasized in Topalian v. Ehrman, 954 F.2d 1125, 1137 (5th Cir.), cert. denied, 113 S.Ct. 82 (1992), "[t]he burden to discover a genuine issue of material fact is not on [the] Court." (emphasis added).

B. Racial Discrimination: Title VII[1]

When faced with a claim of employment discrimination under Title VII, the essential issue in the case is whether the defendant intentionally discriminated against the Plaintiff. United States Postal Serv. Board of Governors v. Aikens, 460 U.S. 711, 715 (1983). The burden of proving "intentional discrimination" is at all times on the plaintiff. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Thus, it is the plaintiff's responsibility to come forth with sufficient evidence to raise an inference that the employer's conduct was racially motivated. Wilson v. Stroh Cos., 952 F.2d 942, 945 (6th Cir. 1992).

A plaintiff may prove intentional discrimination with direct or indirect (inferential) evidence. Davis v. Chevron USA, Inc., 14 F.3d 1082, 1085 (5th Cir. 1994). Direct evidence of discrimination is the exception not the rule. Id. at 1085. Evidence of direct discrimination exists when the employer places a substantial negative reliance on an illegitimate criterion in reaching an employment decision. Id.

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[1] Plaintiff additionally asserts that he was discriminated against in violation of 42 U.S.C. § 1981. The burden of proof in a § 1981 case is the same as in a Title VII action. See Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986); Dooley v. Ft. Worth Independent School Dist., 686 F. Supp. 1194, 1201 (N.D.Tex. 1987), aff'd, 866 F.2d 418, cert. denied, 490 U.S. 1107 (1989). Therefore, the analysis in the present section applies to Plaintiff's section 1981 claim in addition to his Title VII cause of action.

In the context of employment discrimination cases, "[d]irect evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." Id. at 1085; Brown v. East Miss. Elec. Power Ass'n., 989 F.2d 858, 861 (5th Cir. 1993). Direct evidence of discrimination exists when a terminated employee's supervisor openly and routinely uses racial slurs, Davis, 14 F.3d at 1085, or when one partner refers to the plaintiff as "macho", another suggests that she overcompensates for being a woman, a third tells her to go to charm school, and a fourth advises her to talk more femininely, dress more femininely, and wear more jewelry. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989). These comments are "direct evidence" of discrimination because they cannot be interpreted as anything other than a reflection of bias - either racial or sexual. Davis, 14 F.3d at 1085.[2]

If a plaintiff is unable to prove discrimination with "direct evidence", he may prove discrimination by "inference." A plaintiff may inferentially establish a claim of discrimination by following the test discussed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Burdine, 450 U. S. at 248. The test articulated in these cases sets the procedural mechanisms that govern discrimination cases. Under this test: 1) the plaintiff must prove, by a preponderance of the evidence, a prima facie case of discrimination; 2) if the plaintiff is successful, the burden shifts to the defendant to articulate a non-discriminatory reason for its decision; and 3) if that is done, the plaintiff may attempt to demonstrate that the defendant's proffered reason(s) is pretextual. St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2747 (1993).

---

[2] The Plaintiff clearly has failed to present the Court with any evidence that could even remotely be characterized as direct evidence.

In order to prove that he was terminated for discriminatory reasons, the plaintiff must generally prove: 1) that he is a member of a protected class; 2) that he was qualified for the job from which he was discharged; 3) he was discharged; and 4) he was replaced by or the position was given to a non-minority. Meinecke v. H & R Block, 66 F.3d 77, 83 (5th Cir. 1995); McDaniel v. Temple Independent School Dist., 770 F.2d 1340, 1345-46 (5th Cir. 1985). See generally, Hicks, 113 S.Ct. at 2747 (disparagement treatment case). In cases where the employer does not plan to replace the terminated employee, the Fifth Circuit has indicated that the fourth element is, "more appropriately, that after [the] discharge others who were not members of the protected class remained in similar positions." Meinecke, 66 F.3d at 83 quoting Vaughn v. Edel, 918 F.2d 517, 521 (5th Cir. 1990). The plaintiff is, however, still required to provide the district court with some showing of a "causal nexus" between the plaintiff's protected status and the discriminatory action taken. Wilson, 952 F.2d at 945.

In cases involving the alleged violation of work rules, the plaintiff may prove a prima facie case by showing that he did not violate the work rule or that white employees who engaged in similar acts were not punished similarly." Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995). To establish that he was treated differently from white employees, the plaintiff must show that white employees were treated differently under circumstances that were nearly identical to his. Id. at 1090; Little v. Republic Ref. Co., 924 F.2d 93, 97 (5th Cir. 1991); Smith v. Wal-Mart Stores, 891 F.2d 1177, 1180 (5th Cir. 1990); David v. Delta Airlines, Inc., 678 F.2d 567, 571-79 (5th Cir. 1982). If the plaintiff is unable to show that the factual situations were substantially similar, he is unable to establish a prima facie case. Mayberry, 55 F.3d at 1090. However, a plaintiff who is unable to establish that white employees were treated differently may still

establish a prima facie case if he can show that he did not violate the work rule for which he was disciplined. Mayberry, 55 F.3d at 1090; Green v. Armstrong Rubber Co., 612 F.2d 967, 968 (5th Cir.) cert. denied, 449 U.S. 879 (1980).

Once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate non-discriminatory reason for the action taken. Hicks, 113 S.Ct. at 2742. The burden is one of production not of persuasion. Id. at 2747. Therefore, the employer is not required to prove the absence of a discriminatory motive. Id. The defendant meets his burden of production if he presents evidence that "if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) quoting Hicks, 113 S.Ct. at 2742.

If the employer satisfies this burden of production, the plaintiff may prevail only if he proves that the employer's stated reasons for his dismissal are merely a "pretext" or "ruse" designed to conceal its discriminatory motive. Davis, 14 F.3d at 1087; See also, Burdine, 450 U.S. at 255. Thus, if the defendant provides the court with sufficient summary judgment proof of a legitimate reason for not promoting or terminating his employment, the burden shifts to the plaintiff to proffer evidence that the decision was "pretextual". Davis, 14 F.3d at 1088. The plaintiff can avoid a motion for summary judgment only "if the evidence as a whole: 1) creates a fact issue as to whether each of the employer's stated reasons for termination were what actually motivated the employer and 2) creates a reasonable inference that race played a determinative factor in the actions of which the plaintiff complains." (emphasis added) Rhodes, 75 F.3d at 993. Summary judgment should, therefore, be granted if the evidence taken as a whole would not allow a jury to infer that the employee was terminated for discriminatory reasons. Id.

at 994. Thus, "if the evidence put forth by the plaintiff to establish a prima facie case and to rebut the employer's reasons is not substantial, a jury cannot reasonably infer discriminatory intent," and the defendant's motion for summary judgment should be granted. Id.; See also, Sample v. Schuller, Inter., Inc., 836 F.Supp. 876, 880-82 (S.D.Ga. 1993) (granting defendant's motion for summary judgment because the plaintiff failed to provide sufficient summary judgment proof that the defendant's articulated reasons for his termination were pretextual); Armstrong, 997 F.2d at 65 (granting defendant's motion for summary judgment because plaintiff failed to produce sufficient summary judgment proof that the defendant's articulated reasons for her termination were pretextual); Aikens v. Banana Republic, 877 F.Supp. 1031, 1039 (N.D.Tex. 1995) (dismissing plaintiff's Title VII claim because she failed to establish a prima facie case).

An employee cannot resist a defendant's motion for summary judgment based on allegations which are supported only by his own subjective beliefs. Aikens, 877 F.Supp. at 1038 citing Little v. Republic Refining Co., 924 F.2d 93, 96 (5th Cir. 1991); Sherrod v. Sears & Roebuck Co., 785 F.2d 1312, 1316 (5th Cir. 1986); Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 567 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984); McRay v. DPC Indus., 875 F.Supp. 384, 390-91 (E.D.Tex. 1995) (granting defendant's motion for summary judgment because the plaintiff failed to submit summary judgment proof, other than conclusory statements, that he was subject to discrimination). Mere naked allegations or a mere scintilla of evidence cannot prevent the granting of summary judgment. Davis, 14 F.3d at 1087. "[T]he plaintiff must produce specific, substantial evidence of pretext to avoid summary judgment." Willis, 26 F.3d at 890; Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983). The plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986); see also, Devera v. Adams, 874 F.Supp. 17, 23 (D.D.C. 1995) (dismissing plaintiff's Title VII claim and holding that the "plaintiff's experiences as a Smithsonian guard do not provide him with personal knowledge of Smithsonian hiring policy, and he has provided no evidence to support his assertion of discrimination"); Taylor v. Houston Lighting & Power Co., 756 F.Supp. 297, 301 (S.D.Tex. 1990); see also, Palucki v. Sears, Roebuck, & Co., 879 F.2d 1568, 1572 (7th Cir. 1989); Devera, 874 F.Supp. at 17 (granting summary judgment even though the plaintiff submitted deposition testimony that other officers in other companies were not discharged for disobeying the no-tag rule because the plaintiff did not claim to have personal knowledge of such disparate treatment). Further, a plaintiff does not provide sufficient summary judgment proof merely because he "thinks" or "believes" that he was terminated for discriminatory reasons. Taylor, 756 F.Supp. at 301, and a plaintiff's conclusory statement in his affidavit that "I believe that I was discriminated against because of my age . . . is insufficient summary judgment proof because a person's subjective belief that he suffered discrimination cannot alone be the basis for judicial relief." White v. Houston Indep. Sch. Dist., 815 F.Supp. 1016, 1019 (S.D.Tex. 1993). In fact, the Fifth Circuit has long recognized that mere conclusory statements by a plaintiff are insufficient to support a conclusion that an employer was more likely than not motivated by discriminatory intent. White, 815 F.Supp. at 1019; E.E.O.C. v. Exxon Shipping Co., 745 F.2d 967, 976 (5th Cir. 1984); Elliott, 714 F.2d at 564, 566-67. Finally, an employee does not establish, for purposes of summary judgment, that the disciplinary decision was discriminatory merely because the employer's decision later turns out to be incorrect; the plaintiff must show that the decision was made with a discriminatory motive. Mayberry, 55 F.3d at 1091; McDaniel v. Temple Independent School Dist., 770 F.2d 1340, 1349 (5th Cir. 1985) ("the plaintiff

has a far greater burden of proof than merely to show that the defendants's decision not to renew her contact might have been wrong because she really was a good employee. . . "). Title VII does require the employer to establish that the employee's termination was for "good cause." Wilson v. Belmont Homes, Inc., 970 F.2d 53, 57 (5th Cir. 1992). "Even an incorrect belief that an employee's performance is inadequate [or that the employee violated a work rule] constitutes a legitimate, nondiscriminatory reason" for the disciplinary action taken. Little, 924 F.2d at 97; McDaniel, 770 F.2d at 1348. Thus, "[t]he existence of competing evidence about the objective correctness of a fact underlying a defendant's proffered explanation does not in itself make reasonable an inference the defendant was not truly motivated by its proffered justification. Little, 924 F.2d at 97.

In the present case, the Plaintiff maintains that his termination on January 11, 1993 was discriminatory and in violation of Title VII and 28 U.S.C. § 1981. Plaintiff claims that his discharge was "part of a pattern of Vesuvius to open up positions for white employees who had been laid off when Vesuvius shut-down one of its divisions, i.e. 'Viso' division." Plaintiff's Response to Defendant's Motion for Summary Judgment at p. 3.

On January 8, 1993, the Plaintiff was working the 5:00 a.m. to 1:30 p.m. shift. Plaintiff was allegedly supposed to leave work at 1:30 p.m. or when the next shift arrived. Plaintiff claims that he told his direct supervisor Bell he needed to leave on time because he needed to get a flat fixed, Bell Deposition at p. 107-08, and Bell allegedly told him that it would be okay. Id. at 108; 110.

Bell, however, directly contradicts the facts as alleged by Plaintiff in an affidavit supplied to this Court. Bell, Plaintiff's African-American supervisor, claims that on January

8, 1993, he instructed Graves to help with the cleanup and storage of materials from the casting floor, as other employees had been instructed. Affidavit of Calvin Bell p.1. Graves allegedly told Bell that he had punched out his time card and was going to leave the plant. Bell again allegedly told Graves to punch in and get to work because he had not completed the work assigned. Id. Within twenty minutes of their original discussion, Bell claims that he saw Graves in the breakroom/ time clock area and that he instructed Graves to return to his work area. Id. Graves allegedly "asked me [Bell] if I was serious and I told him that I was." Id. Bell then claims that Graves walked out of the building and got into his truck. Id. Bell states that he followed Graves from the building and warned Graves that he better return to work. Id. Additionally, Jimmy Middleton, also an African-American supervisor for the Defendant, claims to have observed Bell directing Graves back to work and Graves ignoring Bell's directive.

> On January 8, 1993, shortly after 2:00 p.m., I was standing in a doorway to the plant and witnessed Calvin Bell directing employee Troy Graves back to work while Graves was walking out of the plant and getting into his truck. Graves disregarded the order to return to work, and got into his truck and left the plant.

Affidavit of Jimmy Middleton p. 1. Graves, however, did not return to work, and he left the premises.

After Graves left, Bell reported the incident to his supervisor Mark Sullivan and to the Manufacturing Manager James Johnson. After a further investigation of the incident, Bell claims that they learned Graves had not clocked out when Bell first ordered him back to work at 1:40 p.m. but had

instead waited until 2:04 p.m. after Bell had ordered him back to work several times.

On January 11, 1993, Bell, Johnson, and Sullivan met with Graves and informed him that he was being terminated for violating a work rule which required him to follow a supervisor's directive and for falsification of information on his time card. Id. Bell maintains, as does the Defendant corporation, that the decision to terminate Graves had nothing to do with his race, and the same decision would have been made had Graves been white.

Based on the summary judgment proof submitted, the Court determines that the Defendant is entitled to summary judgment. First, it does not appear that the Plaintiff has provided the Court with sufficient summary judgment proof to establish a prima facie case that his termination was discriminatory. Plaintiff has failed to provide the Court with any evidence suggesting that non-minority employees were not terminated when they failed to follow a supervisor's order to return to work. Thus, Plaintiff has failed to show that non-minorities were given different treatment under substantially similar situations. Additionally, while it is unlikely that Plaintiff could establish a prima facie case by merely contesting the fact of whether he was ordered back to work, the Court will assume arguendo that Plaintiff has established a prima facie case on this basis.

In response to Plaintiff's arguable prima facie case, the Defendant has articulated a non-discriminatory reason for Plaintiff's termination. The Defendant claims that Plaintiff was terminated because his supervisor directed him to return to work, and Plaintiff ignored his supervisor's directive and left the plant. The Defendant, therefore, has satisfied its burden of production.

Plaintiff, however, fails to establish that the above justification provided by the Defendant was a mere "pretext" or "ruse" for discrimination. The Defendant maintains that the decision to terminate Plaintiff was based on his decision to not follow the directives of his African-American supervisor (Bell) and the statements of a witness to the incident, who was incidently also an African-American supervisor (Middleton), which also supported Bell's version of the facts. Even if the above African-American supervisors were intentionally lying about whether Bell told Plaintiff to return to work, Plaintiff has failed to provide the Court with sufficient summary judgment proof that the decision to terminate his employment was because of a discriminatory animus. Terminating Plaintiff's employment for failing to follow a supervisor's directive, even if incorrect, is clearly a valid basis for terminating an employee's employment. Neither Title VII nor § 1981 require that an employer prove that an employee's termination was for "good cause" or even that their decision to terminate was correct. Title VII and § 1981 only require that the decision to terminate not have been discriminatory. Thus, the summary judgment proof submitted by the Plaintiff fails to provide the Court with sufficient proof that the Defendant's articulated reason for his termination was a pretext for discrimination.

Plaintiff seeks to "confuse" the issue in the present case by citing some "extraneous examples" of "perceived" past discrimination. For instance, Plaintiff claims that Brian West, another Vesuvius employee, left work early, but Plaintiff was not allowed to do so in this case. Bell Depo. at p. 74. The situations, however, were clearly not substantially similar; West was allegedly allowed to leave early because his wife was sick and Plaintiff requested to leave early because he wanted to fix a flat. Id. Plaintiff also complains that he suffered discrimination when he was disciplined for fighting and for carelessness. Id. at p. 43. In addition to failing to show that

these decisions to discipline Plaintiff were discriminatory, Plaintiff's reference to these incidents is unhelpful because the Defendant informed him that the decision to terminate his employment was based on his disobeying a supervisor's order not his previous work related problems.

Plaintiff also complains that the decision to not appoint him to a lead man position was discriminatory; however, he fails to provide the Court with any summary judgment proof of discrimination other than the fact that he claims the position was given to a white man with less seniority. These facts do not establish that a pattern of discrimination existed at Vesuvius. If such facts were sufficient to maintain a cause of action under Title VII, district courts would be overwhelmed with frivolous discrimination claims every time a non-minority with less seniority was promoted. Neither Title VII nor § 1981 require such an in-depth micro-management of daily business decisions by the federal judiciary. Plaintiff's other "examples of discrimination" likewise fail to provide any basis from which a reasonable jury could conclude the Plaintiff's termination was discriminatory.

In conclusion, the Court determines that the summary judgment proof in the present case is insufficient to establish that the Defendant's articulated reason for Plaintiff's termination was false and that his termination was discriminatory. As the Fifth Circuit so recently recognized in Rhodes, summary judgment should be granted when "the evidence as a whole" does not create an issue of a fact as to whether each of the employer's stated reasons for the termination is what actually motivated the employer's decision to terminate the Plaintiff's employment" or "create a reasonable inference that race played a determinative factor in the actions of which the Plaintiff complains. Rhodes, 75 F.3d at 993. The Defendant's motion for summary judgment is, therefore, granted.

C. Statue of Limitations

When a federal statute does not include a statute of limitations, federal courts apply the most appropriate limitations period provided by state law. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975); Dumas v. Mt. Vernon, 612 F.2d 974, 977 (5th Cir. 1980). Claims brought pursuant to § 1981 are characterized as personal injury claims, Price v. Digitala Equipment Corp., 846 F.2d 1026, 1028 (5th Cir. 1988); therefore, Texas' two year statute of limitations applies to Plaintiff's claims. National Ass'n of Governmental Employees v. City of Public Service Bd. of San Antonio, 40 F.3d 698, 713 n.22 (5th Cir. 1994).

Plaintiff alleged that his termination on January 11, 1993 was in violation of § 1981. Plaintiff, however, did not file his section 1981 lawsuit until August 22, 1995. Plaintiff's § 1981 claim is, therefore, barred by Texas two year statute of limitations. Accordingly, it is

ORDERED that Defendant Vesuvius USA's Motion for Summary Judgment is **GRANTED**. It is further

ORDERED that this case is **DISMISSED**.

SIGNED this 17th day of July, 1996.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50621

D.C. Docket No. W-95-CV-274

TROY L. GRAVES

Plaintiff - Appellant

v.

VESUVIUS USA

Defendant - Appellee

Appeal from the United States District Court for the Western District of Texas, Waco.

Before POLITZ, Chief Judge, DeMOSS, Circuit Judge, and DOHERTY,* District Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: May 29, 1997

* District Judge of the Western District of Louisiana, sitting by designation.

OP-OA-J-1

A true copy
Test
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/Latonya Grant
Deputy May 29, 1997
New Orleans, Louisiana

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50621

TROY L. GRAVES

Plaintiff-Appellant

versus

VESUVIUS USA

Defendant-Appellee

Appeal from the United States District Court
for the Western District of Texas
(W-95-CV-275)

Before POLITZ, Chief Judge, DeMOSS, Circuit Judge, and DOHERTY,[1] District Judge.

PER CURIAM:[2]

Troy L. Graves appeals the district court's grant of summary judgment, dismissing plaintiff's claims pursuant to

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[1] District Judge of the Western District of Louisiana, sitting by designation.

[2] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) and 42 U.S.C. § 1981. Troy L. Graves was discharged from his employment at Vesuvius USA on January 8, 1993. Graves subsequently filed suit on August 22, 1995, alleging that his discharge was part of pattern and practice of discrimination against him on the basis of his race and was also part of a plan by Vesuvius to open up positions for white employees who had been laid off when Vesuvius shut down one of the two divisions, i.e., its "VISO Division." (R.159-164).

Having considered the briefs, oral arguments of counsel, and finding no error on the part of the district court, this court finds that summary judgment was properly granted and therefore, we AFFIRM.

ENTERED on May 5, 1997.

Supreme Court, U.S.
FILED
NOV 5 1997
CLERK

No. 97-0611

In The

Supreme Court of the United States

October Term, 1997

TROY L. GRAVES,

Petitioner,

v.

VESUVIUS USA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The petition correctly lists the interested parties except as follows. Counsel for Respondent are:

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The following are parents of Vesuvius USA:

Vesuvius Crucible Company, Cookson America, Inc. and Cookson Group, PLC.

There are no nonwholly-owned subsidiaries of Vesuvius USA.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Vesuvius USA ("Vesuvius") respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Troy L. Graves, seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on May 5, 1997.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below.

Petitioner filed suit on August 22, 1995, alleging that Vesuvius discriminated against him on the basis of his race when Vesuvius decided to terminate Petitioner's employment. (Record p. 1). Petitioner claimed discrimination under Title VII of the Civil Rights Act and under 42 U.S.C. § 1981. On May 23, 1996, Vesuvius filed a Motion for Summary Judgment requesting that the Court grant summary judgment on both causes of action brought by Petitioner against Vesuvius. (Record p. 50). After the Motion was fully briefed by the parties, on July 17, 1996, the Court granted Vesuvius' Motion for Summary Judgment and entered a final judgment dismissing the case. (Record pp. 319 and 337 and Petitioner's Appendix, hereinafter "Appendix" p. 1). Petitioner filed his Notice of Appeal to the U.S. Court of Appeals for the Fifth Circuit on August 13, 1996. (Record p. 341). The District Court found that Petitioner's Section 1981 action was barred by limitations and Petitioner did not appeal this portion of

the summary judgment. The U.S. Court of Appeals for the Fifth Circuit affirmed the District Court Judgment in an unpublished opinion entered on May 5, 1997. (Appendix p. 18).

Statement of Facts

On January 8, 1993, Calvin Bell, an African-American supervisor at the Vesuvius plant, instructed Petitioner, an African-American employee under his supervision, to help with the cleanup and storage of materials from the casting floor, as other employees had been instructed.[1] Petitioner responded by stating that he had punched out his time card and was going to leave the plant. Bell instructed Petitioner to punch in again and get to work as he had not completed the work he was instructed to do. Approximately twenty minutes or so later, Bell saw Petitioner at the breakroom/timeclock area, and again instructed Petitioner to get back to work. Petitioner asked Bell if Bell was serious, and Bell told him that he was. Petitioner then walked out of the building and got into his truck, and as he did so Bell again warned Petitioner that he had better return to work. Petitioner then left in his truck. Jimmy Middleton, another supervisor, also African-American, witnessed Bell ordering Petitioner back to work.[2]

After Petitioner left, Bell explained the incident to his supervisor, Mark Sullivan. Bell and Sullivan then

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[1] The statement of facts is taken from the Affidavit of Calvin Bell (Record pp. 60-61).

[2] Middleton confirms this in his Affidavit. (Record p. 63).

informed James Johnson, Manufacturing Manager, and they reviewed the situation. After reviewing what had happened and looking at Petitioner's time card, it was learned that Petitioner had not already punched out when Bell first ordered him back to work at 1:40 p.m., but that he actually punched out at 2:04 p.m., after Bell had ordered him back to work several times.

At no time did Petitioner ask Bell for permission to leave work, nor did Bell ever give him permission to leave. Petitioner did not tell Bell that he was going to clock out, but did tell Bell at 1:40 p.m. that he had already clocked out.

On Monday, January 11, 1993, James Johnson, Mark Sullivan, and Calvin Bell met about Petitioner, and they collectively decided that Petitioner had to be terminated for violating a work rule which required him to follow a supervisor's directive. The three supervisors then met with Petitioner to discuss his refusal to return to work the previous Friday and the fact that he was being terminated for his refusal to follow a supervisor's directive. Bell was comfortable with the collective decision to terminate Petitioner. The decision to terminate Petitioner had nothing to do with his race, and the same decision would have been made if he had been white.

REASONS FOR DENYING THE WRIT

Petitioner appears to assert two reasons why this Court should grant a Writ of Certiorari in this case. First, Petitioner claims this is a significant case of public interest. Second, Petitioner claims there is a split in the Courts

of Appeals on the standard for summary judgment in Title VII of the Civil Rights Act cases. In fact, this case is not a significant case. Further, this case does not conflict with the other Court of Appeal cases cited by Petitioner. Neither this case separately nor when reviewed with other Courts of Appeal cases justify the granting of the writ of certiorari requested by Petitioner. Petitioner's reasons are discussed in turn below.

First Ground – This Case Is Not a Significant Decision

The Petitioner contends that this is a case of "grave significance." It is a case, like all cases, which is important to the parties. However, the Petitioner's own conduct and the Fifth Circuit Court's handling of this case clearly show that it is not a case of such importance.

Petitioner here only provided the deposition testimony of Petitioner in response to Respondent's Motion for Summary Judgment. Petitioner did not provide affidavits of other employees who confirmed the claimed discrimination or who contradicted the Respondent's reasons for Petitioner's termination. Petitioner did not provide documents of Respondent which contradicted Respondent's reasons for terminating Petitioner's employment. Petitioner did not provide deposition testimony of supervisors or management officials of Respondent who contradicted Respondent's reasons for terminating Petitioner's employment. Indeed, although Petitioner contends that Petitioner would have liked to ask certain questions of Petitioner's supervisor on cross-examination (Petitioner's Petition p. 18), Petitioner failed to take any depositions in this case. Petitioner clearly had

the opportunity to do so. The summary judgment was not granted until eleven days before the trial of this case would have taken place. Further, Petitioner failed to file a motion under Rule 56 of the Federal Rules of Civil Procedure claiming that he needed additional time to respond to a Motion for Summary Judgment. Thus, Petitioner's own conduct in conducting discovery in this matter and in responding to the Motion for Summary Judgment show that this is not a significant case.

In reviewing this case, the Fifth Circuit Court of Appeals determined that this case was not a significant case. The Court wrote only a two paragraph opinion. (Appendix pp. 18-19). The Fifth Circuit Court of Appeals specifically noted that the decision was not to be published and that the decision was not precedent for other cases. There was no dissent as all three judges agreed on this result. Thus, it is clear that the Fifth Circuit Court of Appeals felt that this case did not have grave importance.

Further, the fact that this case is not of importance generally is shown by the fact that Petitioner has been unable to show that the Fifth Circuit Court inaccurately stated the law. At most, Petitioner contends that the Fifth Circuit's review of the evidence was incorrect. It would be impractical and impossible for this Court to review each of the circuit court's handling of the evidence in all the cases decided by these circuit courts. Indeed the Court's own rules make it clear that the granting of a writ of certiorari for such an evidentiary review is not favored. Rule 10 of the Rules of the Supreme Court of the United States.

Second Ground – No Split in the Circuits

Petitioner contends that this Court should grant a writ of certiorari to review this case because of a claimed split in the decisions of the Circuit Courts of Appeals. Petitioner makes this contention because the summary judgment for the employer in this case was affirmed while the summary judgments granted by the trial courts were reversed in the other cases cited by Petitioner. Petitioner cites *Pollock v. AT&T Long Lines*, 794 F.2d 860 (3rd Cir. 1986); *Rodriguez v. General Motors Corp.*, 904 F.2d 531 (9th Cir. 1990); *Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373, 1377-1381 (10th Cir. 1994).

Petitioner first criticizes this Court for its decision in the *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Petitioner argues that the *St. Mary's* decision has created confusion; however, Petitioner then cites the three cases noted above, two of which predated the *St. Mary's* decision by seven and three years respectively.

Petitioner's claim of a split in authority is not backed by a string of cases holding one way in one circuit or set of circuits and another string of cases in another circuit or circuits stating the law differently. Instead, out of the hundreds of employment discrimination cases and employment discrimination summary judgment cases decided by the circuit courts, Petitioner presents this case and three others.

Petitioner cannot assert a split in the Circuit Courts of Appeals based on the opinion in this case. Petitioner cannot contend that the Fifth Circuit Court of Appeals has incorrectly stated the law and is in conflict with the

other courts. The Fifth Circuit Court of Appeals did not write an opinion with a substantive statement of the law in this case.

Petitioner attempts to show a split in the Circuit Courts of Appeals by arguing that the evidence in this case and those cases were substantially similar while the decisions of the Fifth Circuit and the other Circuits were different; however, a review of the evidence in those cases clearly indicates that the evidence in each of the other cases was substantially different from the evidence in this case. In *Pollock*, an African-American employee claimed she was discharged because of her inability to do certain work. The employee's claim that she was discriminated against because of her race was supported by the affidavit of a white employee. The white employee's affidavit corroborated the plaintiff's position and noted certain facts and certain of his own experiences including the fact that he had also been unable to successfully do the same work but had not been terminated. *Pollock*, 794 F.2d at 865. This evidence gave rise to an inference that AT&T had discriminated against Pollock.

There was no comparable evidence in this case. Petitioner provided no evidence to the trial court other than his own deposition testimony. There was no other employee who corroborated Petitioner's statements or who presented evidence that Petitioner was not treated as well as other employees. There was no evidence which would give rise to an inference that Respondent discriminated against Petitioner. Thus, the position of the Third Circuit Court of Appeals in the *Pollock* case is not in conflict with the decision of the Fifth Circuit Court of Appeals in this case. There is no indication that these

Courts were using a different legal standard. Instead, it is clear that the Third Circuit and the Fifth Circuit reached a different result because they were reviewing substantially different evidence.

In *Rodriguez*, the employee complained of discrimination because he failed to receive a promotion. The employer gave three reasons for its action against the employee. The employer stated that: (1) the position was already filled when the employee applied; (2) that a group of employees including the plaintiff agreed that another employee was the best qualified; and (3) that a supervisor believed the other employee was better qualified although the supervisor apparently never considered the plaintiff because the supervisor believed the plaintiff never applied for the job while it was open. *Rodriguez*, 904 F.2d at 533. The court noted that the three reasons were inconsistent with each other and thus, summary judgment was improper.

Again, there was no comparable evidence in this case. In this case, the Respondent's reasons for terminating Petitioner's employment were consistent. Petitioner was terminated because of his conduct on a Friday afternoon when Petitioner left work despite instructions from his supervisor to return to work, and when Petitioner had falsified his time card by failing to clock out when he quit working. In this case, the Respondent's reasons arise out of the same incident of misconduct and are consistent with each other. The Ninth Circuit in *Rodriguez* and the Fifth Circuit in this case are not in conflict as to any statement of the applicable legal standard for summary judgment. Instead, the two Courts reached a different result because the evidence presented in each case was

different. The different evidence in these two cases led to a different result.

In *Cole*, the employee, a school principal, claimed discrimination based on her sex. The employer first claimed that the employee was transferred and demoted because of budget reasons. *Cole*, 43 F.3d at 1380. The employer later claimed the demotion and transfer was because the employee was unable to maintain a cohesive faculty. Thus, the employer gave two completely different reasons at two different points in time. However, the plaintiff did not stop there in producing evidence of pretext.

The plaintiff showed that the employer's own excellent evaluations of her performance contradicted the reasons given by the employer. The plaintiff also provided affidavits of other teachers that showed that the problems with the faculty began during the tenure of the previous principal, a male who had been promoted. In addition, the plaintiff provided evidence of test scores which showed that her students' test scores rose from the forty-third percentile to the seventy-third percentile during her tenure as principal. Thus, the plaintiff there provided an array of evidence contradicting the employer's claim that she had poorly performed. The Tenth Circuit Court was reviewing a situation in which a large amount of evidence including the employer's own evaluations contradicted the reasons given by the employer.

Such evidence was not presented by Petitioner here. Petitioner relied only on the Petitioner's own testimony that disputed the Respondent's reasons for termination. The Petitioner did not show that the reasons given by the

Respondent for the termination changed. The Petitioner did not provide affidavits of other employees that contradicted the reasons given by Respondent. The reasons given by Respondent for termination of Petitioner were not contradicted by Respondent's own evaluations of Petitioner.

The decisions of the Tenth Circuit Court in *Cole* and of the Fifth Circuit here do not show any indication of a different legal standard; however, there is clear showing that the evidence presented in the two cases differed. The Tenth Circuit and the Fifth Circuit reached different results because the evidence which they reviewed was greatly different.

Third Ground – This Case Was Correctly Decided

A. Summary of This Argument.

This is a relatively simple case. It is a case where the Respondent's actions had nothing to do with race but where Petitioner has alleged discrimination based on race. Petitioner, an African-American male, worked under an African-American male supervisor, Calvin Bell. Petitioner refused to return to work after repeated requests from Mr. Bell and instead left the plant. This action was witnessed by another supervisor, Jimmy Middleton, also African-American. The actions of Petitioner were reported to others in management and the decision was made to terminate the employment of Petitioner. Mr. Bell participated in this decision and agreed that it was made without regard to the race of the Petitioner. Respondent's action and the reasons for it were shown by Mr. Bell and Mr. Middleton's affidavits. Thus, summary

judgment was properly granted to Respondent. Even if Petitioner established a *prima facie* case by disputing the workrule violation, Respondent produced a legitimate non-discriminatory reason for its action. Petitioner failed to prove that Respondent's legitimate non-discriminatory reason was a pretext and thus summary judgment was proper.

B. Summary Judgment Evidence.

In support of the Motion for Summary Judgment, Respondent submitted the Affidavit of Petitioner's immediate supervisor, Calvin Bell, the Affidavit of Jimmy Middleton, a witness to Petitioner's confrontation with his supervisor, and the Affidavit of David McPherson which authenticates Respondent's Employee Handbook. (Record pp. 60-61, and 65-79). Petitioner submitted no summary judgment evidence except excerpts from Petitioner's deposition and attached exhibits. The summary judgment proof including these affidavits and Exhibits demonstrated that no genuine issue of material fact existed as to the motivation for Petitioner's termination and that such termination was not motivated by Petitioner's race. As a result, Respondent was entitled to a summary judgment.

C. Summary Judgment on Petitioner's Title VII Claims was Proper.

Petitioner complains that his termination was motivated by his race in violation of Title VII of the Civil Rights Act of 1964. (Petition, Record pp. 1-12). Broadly speaking, in order to have a cause of action under Title

VII for race discrimination, the Petitioner must show that he was discharged "because of" his race. 42 U.S.C. § 2000e-2(a)(1). In other words, he must prove that the Respondent intentionally discriminated against him because of his race or that race was a substantial motivating factor in the Respondent's adverse employment decision. *McDonnell Douglas Corp. v. Green*, 411 U.S. 721, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Because direct proof of discriminatory intent is often difficult to find, the Supreme Court has adopted a tripartite inquiry and burden shifting process for the evaluation of the evidence proffered on the issue of discrimination. As set forth in *McDonnell Douglas Corp.*, and as articulated in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), a plaintiff must first establish a *prima facie* case of discrimination regarding the adverse employment action taken against him. Second, if the plaintiff establishes a *prima facie* case, the burden shifts to the defendant employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. Finally, after the defendant employer articulates a legitimate, non-discriminatory reason, the burden shifts back to the plaintiff who must demonstrate that the articulated rationale is merely a pretext for unlawful discrimination. *McDonnell Douglas Corp.*, 411 U.S. at 802-4; *Burdine*, 450 U.S. at 252-3; *see Wilson v. Belmont Homes*, 970 F.2d 53 (5th Cir. 1992).

The elements of a plaintiff's *prima facie* case for a work rules violation case such as here consist of evidence that he was within a protected class and that he did not violate the work rule or that, if he did, white employees who engaged in similar acts were not punished similarly.

Mayberry v. Vought Aircraft Company, 55 F.3d 1086, at 1089-90 (5th Cir. 1995); *see also McDonnell Douglas Corp.*, 411 U.S. at 802; *Burdine*, 450 U.S. at 248; *Bienkowski v. American Airlines*, 851 F.2d 1503, 1506 (5th Cir. 1988).

If a plaintiff can demonstrate such a *prima facie* case, the burden then shifts to the defendant employer to articulate legitimate, non-discriminatory reasons for its contested actions. However, the burden of proof remains with the plaintiff at all times. The defendant employer need only put forth its non-discriminatory rationale but need not prove it by a preponderance of the evidence in order to eliminate the presumption created by the *prima facie* case. *Burdine*, 450 U.S. at 254; *Wilson*, 970 F.2d at 57; *McDaniel v. Temple Independent School District*, 770 F.2d 1340, 1346 (5th Cir. 1985).

Following a defendant-employer's articulation of a non-discriminatory reason for a particular action, the plaintiff then bears the ultimate burden of proving that the true, underlying reason for the defendant-employer's actions was intentional, unlawful discrimination. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715-16, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *McDaniel*, 770 F.2d at 1346. In meeting the ultimate burden of proving pretext, the plaintiff must show that the defendant-employer's actual intent was to discriminate. Thus, evidence that an employer made an incorrect or poor decision is insufficient. *McDaniel*, 770 F.2d at 1348; *see Wilson*, 970 F.2d at 57 (inquiry is not into merits of employer's decision but into the motives). The question is not whether an employer made an erroneous decision; it is whether the decision was made with discriminatory motive. *Mayberry*, 55 F.3d at 1091.

In *Mayberry*, the Fifth Circuit affirmed the district court's grant of summary judgment for an employer accused of racial discrimination. *Mayberry* involved a black employee who was suspended for poor workmanship after four separate disciplinary actions were issued within a year for previous instances of poor workmanship in violation of Vought's Code of Conduct. Vought used a progressive discipline program consisting of a verbal warning, written warning, suspension, and termination. Mayberry claimed that his suspension was on account of his race, and/or in retaliation for prior discrimination claims brought against Vought and his participation in demonstrations against Vought for its alleged discriminatory practices. The Fifth Circuit affirmed the district court's holding that "Mayberry failed to establish a *prima facie* case of discrimination, and, assuming a *prima facie* case of discrimination, that Mayberry was unable to overcome Vought's defense that the suspension resulted from its honest belief that Mayberry had violated the work-rule." *Id.* at 1089.

Mayberry claimed that he did not violate work-rules, and that similarly situated white employees were treated differently. *Mayberry*, 55 F.3d at 1090. To establish a *prima facie* case based on disparate treatment, the plaintiff "must show that white employees were treated differently under circumstances 'nearly identical' to his." *Id.* (citations omitted) (emphasis added). Mayberry failed to produce evidence that white employees in "nearly identical" circumstances had been treated differently. The court construed the "nearly identical" language strictly and emphasized Mayberry's failure to produce evidence of white employees who also had a history of poor work

performance, but were not disciplined similarly. *See id.* at 1090 n.3; *Little v. Republic Refining Co. Ltd.*, 924 F.2d 93, (5th Cir. 1991) 96-97 (rejecting rebuttal evidence of disparate treatment because circumstances were not "nearly identical").

Vought met Mayberry's claim that he not violated any work-rules with a legitimate, nondiscriminatory assertion that Vought's decision to suspend Mayberry was based solely on its conclusion, following an investigation, that Mayberry was at least partially at fault for the scrapping of over $8,000 in material. *Id.* at 1090. In attempting to prove pretext, Mayberry simply reasserted his *prima facie* evidence and attempted to rely on Vought's admission that machine error may have been partially responsible. *Id.* & n.4. The Court rejected Mayberry's attempt to rely on Vought's uncertainty about the machine error in order to raise a fact issue regarding Vought's nondiscriminatory reason. The Court stated that "[t]he question is not whether an employer made an erroneous decision; it is whether the decision was made with discriminatory motive." *Id.* at 1091. In the absence of any evidence challenging the credibility of Vought's nondiscriminatory reason for the suspension, summary judgment was deemed appropriate. *Id.* at 1091 & n.6.

In this action, Petitioner supplied only his own testimony that he did not violate the work rule. By his own testimony, Petitioner attempted to contradict the testimony of the two African-American supervisors that he in fact did violate the work rule by ignoring his supervisor's repeated request that he return to work. Respondent's Employee Handbook provides that "Failing to carry out any reasonable order by a management representative,

including to work on jobs assigned by supervisor or his authorized representative" is grounds for termination. (Record p. 76). (See also Subsection E of the Third Ground herein which discusses Respondent's other reason for the termination of Petitioner's employment.) Even if this Court believes that Petitioner did prove a *prima facie* case, the summary judgment proof provided by Respondent conclusively demonstrated a non-discriminatory and legitimate reason for Petitioner's termination: his blatant disobedience of repeated directives from his immediate supervisor. That such insubordination is a legitimate, non-discriminatory reason for termination of employment cannot reasonably be questioned. *See Klein v. Trustees of Indiana University*, 766 F.2d 275 (7th Cir. 1985) (summary judgment on Title VII claim upheld where defendant articulated insubordination as basis for termination).

In their affidavits, Petitioner's immediate supervisor, Calvin Bell, and another witness, Jimmy Middleton, laid to rest any contention that Petitioner's termination was based upon an impermissible motive. By articulating a legitimate, non-discriminatory reason for Petitioner's termination, Respondent shifted the burden of proof back to Petitioner. Petitioner was then required to submit evidence that created a fact issue as to whether each of the employer's stated reasons was legitimate and evidence that creates a reasonable inference that Respondent intentionally discriminated on the basis of race in the actions of which Petitioner complained. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996). Because Petitioner submitted no competent summary judgment proof to carry this burden of proof, or even to create a fact issue on this

element, Respondent was entitled to summary judgment on Petitioner's Title VII claim as a matter of law. *Klein*, 766 F.2d at 283.

Petitioner's statements of his subjective belief that racial discrimination occurred do not show that the Respondent's reason for discharge, i.e., the employee refused to return to work when asked to do so, was a pretext. Such personal perceptions or subjective beliefs are not enough to allow Petitioner to avoid summary judgment. *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996). "It is more than well-settled that an employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion, in the face of proof showing an adequate nondiscriminatory reason." *Id.* at 1419.[3]

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[3] (This quotation continues as follows) *See, e.g., Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 434 (5th Cir. 1995) ("bald assertions of age discrimination are inadequate to permit a finding that proscribed discrimination motivated [defendant's] actions against [plaintiff]"); *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994) (employee's "self-serving generalized testimony stating her subjective belief that discrimination occurred . . . is simply insufficient to support a jury verdict in plaintiff's favor"); *Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 96 (5th Cir. 1991) ("an age discrimination plaintiff's own good faith belief that his age motivated his employer's action is of little value"); *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 246 (5th Cir. 1985) ("we cannot allow subjective belief to be the basis for judicial relief when an adequate nondiscriminatory reason for the discharge has been presented"); *Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 566 (5th Cir. 1983) ("generalized testimony by an employee regarding his subjective belief that his discharge was the result

The summary judgment evidence showed that it was an African-American supervisor who requested Petitioner to return to work and another African-American supervisor (i.e., two persons of the same race as Petitioner) who saw Petitioner commit the rules violation in question. Further, the summary judgment evidence showed that the supervisor involved in the termination of Petitioner stated that race was not considered and that the same decision would have been made if Petitioner was white. Also, the summary judgment evidence showed that such a work rules violation was grounds for termination under the employer's personnel policy. The precise rule involved is set forth below:[4]

> 6. Failing to carry out any reasonable order by a management representative, including to work on jobs assigned by a supervisor or his authorized representative.

This rule is contained in the section labeled "Most Serious Acts". This section provides "Violation of these rules will result in your immediate suspension pending investigation; and if substantiated, your discharge." (See employee handbook pages 11 and 12 attached to Affidavit of David McPherson, Record p. 76).

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of age discrimination is insufficient to make an issue for the jury in the face of proof showing an adequate, nondiscriminatory reason for his discharge"), *cert. denied*, 467 U.S. 1215, 81 L.Ed.2d 364, 104 S. Ct. 2658 (1984).

[4] This is shown by the Termination Report attached to Plaintiff's deposition and attached to Plaintiff's response. (Record p. 223). This document also reflects Plaintiff's lying to his supervisor about having already clocked out. This is also a violation covered under the "Most Serious Acts" section.

Although Petitioner may argue with Respondent's reason for termination and may offer his own testimony that the rules violation did not occur, Petitioner did not offer any proof which established Respondent's discriminatory intent. Petitioner may argue that his African-American supervisor was incorrect in his perception and testimony about the rules violation. Petitioner may also argue that the African-American supervisor who witnessed the rules violation was incorrect in his perception and testimony regarding the rules violation. However, this is not sufficient. It is not enough to show that the decision was incorrect or that there is evidence that the decision was incorrect. Petitioner failed to show that these individuals (and thus Respondent) had any discriminatory bias against Petitioner who is of the same race as them.

The Fifth Circuit has made it clear that to avoid summary judgment Petitioner's evidence must create an inference of discrimination. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996). Here, even if the fact finder believed Respondent was mistaken in its view of the work rules violation, there is nothing to indicate that the decision to terminate Petitioner's employment was caused by discrimination. Petitioner's supervisor, who was of the same race, was the one who reported Petitioner's improper actions. As the Fifth Circuit Court and other Circuit Courts have generally noted, the fact that the actor involved is also a member of the same protected class makes it more unlikely that discrimination occurred. *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996). Thus, the summary judgment in this case was proper.

D. Petitioner's "Proof" of Other Perceived Acts of Discrimination Does Not Establish Pretext.

Petitioner's complaints about other actions of Respondent also do not show pretext in connection with the employment action in question here, the termination of Petitioner's employment. There is no showing by Petitioner that any of the prior actions complained about in any way affected the Respondent's decision to terminate Petitioner's employment. Respondent disputes these complaints. However, even if these complaints are considered correct for summary judgment purposes, these complaints are not sufficient to show pretext and create an inference of discrimination.

For example, Petitioner claims that Petitioner was in line to serve as a leadman in the absence of his regular leadman and did serve in that position for a day but was subsequently removed and replaced by a white employee who had less seniority than Petitioner. Petitioner's statement that he had more seniority than the white employee is without significance. It is well established that merely showing that decisions are contrary to seniority or years of experience is not sufficient to establish discrimination. *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 959 (5th Cir. 1993). The Fifth Circuit recently noted again that years served do not necessarily mean superior qualifications. *Nichols v. Loral Vought Systems Corporation*, 81 F.3d 38 (5th Cir. 1996). The only other evidence that Petitioner cited is that Petitioner trained the white employee in how to perform the job of leadman. Again, this evidence was not sufficient to show that there was any discrimination

involved. Petitioner failed to show the respective qualifications of the two individuals, himself and the white employee, in any number of ways such as (1) experience in supervision, (2) education, (3) special training, (4) ability to act as a supervisor, (5) ability to get along with and to work well with other people, (6) whether Petitioner's performance on the one day was satisfactory, (7) whether the white employee continued to have the job or was also replaced, and (8) experience in other work settings. Thus, Petitioner failed to show that this incident provides any evidence of discrimination.

Petitioner also failed to show that the white employees he alleged were treated differently were in situations nearly identical to his. *Mayberry v. Vought Aircraft Company*, 55 F.3d 1086, at 1089 and 1090 (5th Cir. 1995). For example, Petitioner claims he once requested to be allowed to leave work early because his wife was sick but was not allowed to do so and states that another employee was granted the right to leave work early when that employee's wife was sick. This assertion does not deal with the incident in question for which Petitioner was terminated where Petitioner was clearly leaving because he wanted to get a tire for his truck. (Petitioner's Deposition, Record p. 173). In any event, Petitioner failed to show that the circumstances were nearly identical in failing to show that the illnesses of the two wives were comparable, the situation at work was comparable, i.e., what were the workplace demands were placed on the supervisor on that day regarding workforce production, availability of other employees, etc. Thus, Petitioner

failed to show that there were nearly identical circumstances involving the two employees on even this unrelated incident.

In *Mayberry*, the court also had to deal with "proof" of other prior incidents of perceived discrimination. There the plaintiff noted prior incidents in which he and others had filed discrimination complaints. The court noted that such complaints, even with an occasional finding that the employer had discriminated against others, do not suggest that the defendant discriminated against Mayberry. *Mayberry* at 1091. The Petitioner herein complains about several incidents in the past which are unrelated to the present issue and for which no prior discrimination complaints were even filed. As in *Mayberry*, such complaints do not suggest that the defendant has discriminated against plaintiff in this instance. *Mayberry* at 1091.

Mayberry also complained that white employees were treated differently when they caused parts to have to be scrapped and based his complaint on the Accumulated Scrappage Material record ("ASM"). However, the court noted the ASM's presented an incomplete picture of such situations and did not show that white employees were treated differently under circumstances nearly identical to Mayberry's. *Mayberry* at 1090. Likewise, Petitioner presents vague complaints about how white employees were treated differently. These complaints also do not show proof of discrimination in this matter as they were not connected with Respondent's decision to terminate Petitioner's employment. Further, these complaints, like the ASM's, provide an incomplete picture which does not show that other employees were treated differently under

circumstances which were nearly identical. Like the ASM's, these complaints fail to show the details of any perceived act of discrimination, such as what any investigation determined, what the work record of the employee was, or the other circumstances of the matter. Thus, these complaints are not proof of even a *prima facie* case and are not proof of pretext or discrimination. *See Mayberry* at 1091.

The weakness of Petitioner's case is further illustrated by his avoidance of the specific incident involved in Petitioner's termination and his desire to focus on other matters. Petitioner does not want to discuss why two African-American supervisors reported that Petitioner refused repeated requests to return to work and left the plant. Petitioner does not even state a reason why he believes the supervisor witness Middleton would create this event. The best evidence that Petitioner provides to refute this is hearsay statements that Bell allegedly told Petitioner that he was following instructions and either Bell or Petitioner was going to get fired. (Petitioner's Brief, page 4, Petitioner's Deposition Record p. 187). These statements are directly contradicted by Bell's affidavit that he agreed with the decision to terminate Petitioner and that race was not a factor in the decision. (Record pp. 60-61).

E. The Claimed Factual Errors in the District Court's Order Do Not Show that The Summary Judgment was Improper.

Petitioner complains that the District Court made three factual errors in the Court's order:

(1) that the Court inaccurately stated that Petitioner was told he was being terminated for violating a workrule which required him to follow a supervisor's directive and for falsification of information on his time card;

(2) that the Court inaccurately stated, in reference to Petitioner's complaint about not being appointed leadman, that Petitioner failed to provide any summary judgment proof of discrimination other than the position was given to a white man with less seniority; and

(3) that the Court's Order inaccurately stated that another employee had been allowed to leave early because his wife was sick and that the District Court did not discuss a similar request by Petitioner which was refused. (Petitioner is not complaining about the incident in question here when Petitioner admitted he wanted to leave to get a tire repaired. See Record pp. 173, 176-77).

Petitioner complains that the District Court order stated that Petitioner was told that he was discharged for two reasons, i.e., violating a workrule which required him to follow a supervisor's directive and for falsification of information. Petitioner's argument with the District Court's order is whether Petitioner was told about the falsification of the time card when he was terminated. Bell's Affidavit (Record pp. 60-61), and the termination report (Record p. 224), both support the Court's statement. The additional comments section of the termination report states "Troy was told to go to work and to help

finish cleaning up. Then he refused after being told several times. Troy went home. He also lied about having punched out his time card." This statement is consistent with Bell's affidavit which shows that Petitioner told Bell he had clocked out at 1:40 p.m., that Petitioner had not gone back to work despite several requests that he do so, and that Petitioner had not actually clocked out until 2:04 p.m. which was after Petitioner had been ordered back to work but had refused to return to work.

In connection with this alleged error, Petitioner attempts to make a minor issue of the fact that James Johnson added the words "Falsification of Information" to the termination report. (Record p. 224). Johnson noted this addition by signing his name next to it. Thus, there is no question of someone attempting to hide this addition. In fact, this addition merely makes the Reason for Separation section consistent with the additional comments section filled out by Calvin Bell which already noted "He also lied about having punched out his time card."

In any case, the termination report and Bell's affidavit clearly show that Petitioner was terminated for his actions in relationship to this incident. Whether Petitioner was told he had violated two rules or one is of no significance. Either rule violation justified his termination. (See Personnel Handbook record p. 76, i.e., Rule 4 "Punching another employee's time card, falsifying any time card or timekeeping record or, intentionally giving false information to anyone who keeps such records" and Rule 6 "Failing to carry out any reasonable order by a management representative, including to work on jobs assigned by a supervisor or his authorized representative.") Both of these rules are listed under the "Most

Serious Acts" section which provides that violation of these rules will result in discharge. Further, both rule violations arose out of the same incident and the discussion of just one would not in any way show pretext as both the termination report and Bell's affidavit showed both violations occurred.

The second "error" in the District Court's order Petitioner complains about deals with the temporary leadman position and whether Petitioner supplied any evidence besides the Petitioner s and the other employee's relative seniority. Petitioner notes that he "trained" the other employee. As discussed in the preceding section, mere seniority is not sufficient, and such testimony of "training" also does not show the respective qualification of the Petitioner and the other employee. Often a person in a lower level will help "train" a new superior just as an experienced legal secretary may train a new lawyer. Such training is often very helpful, but it does not mean that the trainer is more qualified for the trainee's position. Thus, even if Petitioner feels this statement about training makes the District Court order technically incorrect, the result is the same. The Petitioner failed to provide sufficient proof to cause this unrelated incident to be any evidence that Defendant's reason was a pretext for discrimination.

Petitioner next complains that the District Court failed to acknowledge in its order that Petitioner claims to have requested the opportunity to leave early on a different occasion when his wife was sick. The District Court's order accurately reflects that the incident in question, leaving before work is completed to get a tire fixed, was not substantially similar to another employee leaving

early because his wife was sick. Petitioner complains that the Court does not also mention an unrelated occasion when Petitioner says he was not allowed to leave early when his wife was sick. This matter is discussed in detail in the preceding section of this brief. As noted there, Petitioner failed to show that the circumstances for his request were nearly identical to those of the approved request and therefore that incident is no evidence of pretext.

In summary, the Petitioner's complaints about perceived factual errors in the District Court's order do not affect the propriety of the grant of the summary judgment.

F. Conclusion to the Third Ground Section.

The summary judgment granted by the District Court and affirmed by the Fifth Circuit was proper. The Petitioner's proof of a *prima facie* case consisted virtually of his denial that he violated the work rules and his complaints about other unrelated incidents. The District Court correctly found that, even if one assumed that the Petitioner had established a *prima facie* case, Respondent properly came forth with a legitimate non-discriminatory reason for its actions, i.e., the report of two supervisors of the same race as Petitioner that Petitioner had broken the work rules in question. The Respondent's proof included its personnel handbook which showed that violations of such nature were grounds for the termination of Petitioner's employment.

Petitioner then failed to show that the Respondent's legitimate non-discriminatory reason was a pretext and to create an inference of intentional discrimination. Petitioner's proof again consisted of Petitioner's denial that he had violated the work rules and Petitioner's complaint about his treatment in other unrelated incidents. Petitioner failed to show that these prior incidents were related to Respondent's action against him in terminating his employment and also failed, even in those unrelated incidents, to show that he was treated differently than white employees in nearly identical circumstances.

As noted above, it was not sufficient for Petitioner to establish simply that Respondent's decision was wrong. He must also establish that Respondent had a discriminatory reason for its action. Petitioner failed to show that Respondent had a discriminatory reason for such action as Respondent, without dispute, acted on the report of two supervisors of the same race as Petitioner. To show pretext, Petitioner needed to show not only that these two supervisors were incorrect but that they had a discriminatory reason for their action. Petitioner offered no evidence that the supervisors believed their report was wrong or that, if they did, that they made such a report for discriminatory reasons.

The District Court's granting of summary judgment was proper and such judgment was properly affirmed by the Fifth Circuit Court of Appeals.

CONCLUSION

Petitioner has failed to provide any compelling reasons for this Court to grant a Writ of Certiorari. There is no split among the circuits. Rather, in this case and the three cases cited by Petitioner, the Courts of Appeals apparently applied the same rule of law to the different facts presented in each case. Each court then reached a proper decision based on those facts. Further, this case has not been used by the District Court or the Court of Appeals to state a new and important position on an important or unsettled question of the law. Instead, this is a case only of significance to the parties.

Petitioner contends the Fifth Circuit Court of Appeals reached an incorrect result; however, this appears to be an argument that the Fifth Circuit Court of Appeals improperly applied the law established by this Court to the facts in this case. Such an evidentiary review is not favored by this Court. Further, Respondent strongly believes that the District Court and the Fifth Circuit Court of Appeals were correct in their decisions. This case does not merit further review by this Court.

For all of the foregoing reasons, Respondent requests that Petitioner's petition be denied.

Respectfully submitted,

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